In the Supreme Court

of the United States

OCTOBER TERM, 1950

No.....

HALESTON DRUG STORES, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported in 187 Fed (2d) 418. The opinion is also printed in full in the record (R. 83-92).

STATEMENT OF THE CASE

Petitioner filed an unfair labor charge against certain named unions (R. 2). The General Counsel of the National Labor Relations Board issued a complaint against said unions (R. 5). The National Labor Relations Board dismissed the complaint on the ground that it would not effectuate the policy of the Act to exercise jurisdiction (R. 23).

The United States Court of Appeals for the Ninth Circuit dismissed the petition for a review of this order of the Board (R. 92). Additional facts are set forth in the preceding petition in the statement of the matter involved (pp. 2-4), which facts are hereby adopted and made a part of this brief.

ARGUMENT

I.

The Decision of the United States Court of Appeals Involves an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by the Supreme Court of the United States.

A. The action of the Board dismissing the complaint does not carry out the purpose and policy of the National Labor Relations Act and constitutes a refusal to protect the rights of the public in connection with labor disputes affecting commerce.

The issue in this case is not whether the dismissal would or would not effectuate the policies of the Act,

but the fact that the Board has misconstrued the policy of the Act emphasizes the importance of an interpretation of the Act by this Court.

The policy of the Act, the ultimate end, is to promote the full flow of commerce. The means of attaining this end are those provisions defining the rights of employees and employers and those provisions establishing peaceful procedures for protecting these rights. The provisions establishing peaceful procedures are those concerning elections, complaints, hearings, testimony, evidence and review (Labor Management Relations Act, 1947 (29 U.S.C. 141 (b), 151). In Section 151, findings are made by Congress to the effect that certain practices (strikes, picketing, boycotts, hand bills) by some unions have the necessary effect of burdening commerce by preventing the free flow of goods.

The policy of the Act is to eliminate the causes of certain substantial obstructions to the free flow of commerce and to eliminate these obstructions by encouraging the practice and procedure of collective bargaining. The "substantial obstructions" are "certain practices by some unions" which burden commerce by preventing the free flow of goods. "Substantial obstructions" does not refer to the amount of business done by the employer in interstate commerce as the Board seems to believe when it states: " . . . we find that interruption of the employer's business operations by a labor dispute would have only a remote and insubstantial effect on commerce" (R. 33). The "certain practices" referred to are the economic weapons employed by unions such as the strike, boycott and blacklist.

The dismissal by the Board denies to petitioner the peaceful procedures of the Act whereby petitioner might have a determination of petitioner's legal rights and duties under the Act in the controversy existing between petitioner and the unions.

The lack of peaceful procedures to settle the legal rights and duties of petitioner and the unions under the Act results in continued interruption of commerce by picketing which is a substantial obstruction to the free flow of commerce.

Therefore, the dismissal does not effectuate the policy of the Act, but on the contrary, the dismissal is a refusal to protect the rights of the public in connection with labor disputes affecting commerce and there are many such disputes where the Board refuses to assume jurisdiction. This discretion was not delegated to the Board by Congress.

B. The interpretation of the Act granting the Board discretion to dismiss a complaint for policy reasons results in government by man, not by law, and creates confusion and uncertainty in a great number of businesses both large and small.

No standards are set forth in the Act defining the limits of the agency's claimed discretion.

The Board claims the right to assume or refuse jurisdiction in a particular case depending, not upon its merits, but upon the Board's budget or case load at the particular time that the case is reached on its trial calendar.

Neither employer, employee, nor labor organization is able to anticipate in such businesses as drugs, grocery, bakery, photography, hotel, automobile and hundreds more, whether to govern their activities with a view to the provisions of the National Labor Relations Act or the relevant state statutes regulating intrastate commerce because such discretionary power would be and is exercised without any body of precedent for guidance. In the bakery and automobile industry, the Board has not followed a consistent policy.

In the bakery cases consolidated in the case of *In re Fehr Baking Co.*, 79 N.L.R.B. 440 (1948), the Board refused to asssert its jurisdiction on the ground that it would not effectuate the policies of the Act, even though in one case purchases during the year amounted to one million dollars of which $509,000.00 were purchases outside the state.

Then in *McGough Bakeries Corp.*, 90 N.L.R.B.— No. 272 (1950), the Board exercised jurisdiction over a retail bakery where approximately one-half of the supplies purchased were purchases outside the state.

In *Newton Chevrolet, Inc.*, 37 N.L.R.B. 334 (1941), the Board exercised jurisdiction over an automobile dealer.

In *Herff Motor Company*, 74 N.L.R.B. 1007 (1947), the Board refused to exercise jurisdiction over an organization rebuilding automobile engines.

Then in *Liddon-White Truck Company, Inc.*, 76 N.L.R.B. 1181 (1948), the Board in exercising jurisdic-

tion stated: "Although we have on occasion refused to assume jurisdiction over enterprises similar to the employers on the ground that the investigation and processing of such cases by the Board would not effectuate the policies of the Act, we are of the opinion that the policies of the Act can be best effectuated if the organizational activities of the employees herein involved are conducted within, rather than without, the framework of the Act." Two members dissented, stating: "We would maintain the policy of self-abnegation enunciated in the Herff Motors case decided less than a year ago rather than return to doctrine that has lain quietly interred since Newton Chevrolet issued in 1941."

The Board supposedly established "yardsticks" for determining when it would exercise jurisdiction in eight decisions issued simultaneously in October, 1950, to-wit:

W.B.S.R., Inc., 91 N.L.R.R. ....., No. 110;

W. C. King dba Local Transit Lines, 91 N.L.R.L. ....., No. 96;

The Borden Co., 91 N.L.R.B. ....., No. 109;

Stanislaus Implement and Hardware Co., 91 N.L.R.B. ....., No. 116;

Hollow Tree Lumber Co., 91 N.L.R.B. ....., No. 113;

Federal Dairy Co., 91 N.L.R.B. ....., No. 107;

Dorns House of Miracles, Inc., 91 N.L.R.B. ....., No. 82;

The Rutledge Paper Products, Inc., 91 N.L.R.B. ....., No. 115.

In the Borden Company case (supra), the Board said it would exercise its jurisdiction in the case of

Multi-State Enterprises "even though management is entrusted to local officials and the particular plant may sell its entire product within the state where it is located".

In the Federal Dairy case (supra), the Board stated that its current budget and case load prevented it from taking cases involving companies that purchased less than $500,000.00 in materials from interstate sources in a year.

Shortly thereafter the Board departed from these yardsticks by announcing its intention not to take cases involving hotels or associations of hotels. *Hotel Association of St. Louis,* 91 N.L.R.B. ....., No. 561. To be consistent with previous policy, the Board should have taken jurisdiction on at least two grounds, i.e., (1) purchase of goods out of state valued at over $500,000.00; (2) several association members operated as part of interstate chains.

The fact, as illustrated by these cases, that the Board vacillates between assuming jurisdiction and refusing jurisdiction causes confusion and uncertainty in business relations over the entire country. It is important to the public that this Court settle the question of whether or not the Board has this discretion to dismiss complaints on policy grounds even though it has jurisdiction in fact.

C. The exercise by the Board of this claimed discretion usurps the "final authority" granted to the General Counsel and destroys the complete separation of function and authority between the General Counsel and the Board which Congress intended for the public interest and welfare.

The amendments of 1947 to the National Labor Relations Act established the office of the General Counsel of the Board. The General Counsel was given the exclusive duty to issue complaints and prosecute cases as an agency independent, though within, the Board. This is set forth in Section 3 (d) (29 U.S.C. 153 (d)) as follows:

> " '(d) There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under Section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law.' "

In issuing a complaint, the General Counsel necessarily finds:

(1) That there is probable cause to believe the existence of unfair labor practices;

(2) There is probable cause to believe there is jurisdiction to correct these practices;

(3) The nature of these unfair labor practices and the effect upon commerce is sufficient to warrant the exercise of the Board's corrective jurisdiction.

When the matter comes before the Board, it is free to find against the General Counsel on either (1) or (2). However, it is submitted that in view of the Section 3 (d), the Board has no discretion or authority to re-examine the General Counsel's decision with respect to the third factor. The dismissal of the complaint on policy grounds is a decision squarely in conflict with that of the General Counsel and constitutes, if valid, a review and reversal of his decision.

The final and unreviewable authority of the General Counsel is supported by the Act read as a whole wherein it appears that Congress intended to exercise its power over commerce to the fullest extent possible under the Commerce Clause and even over merely local businesses. *N.L.R.B. v. Fainblatt,* 306 U.S. 601, 606, 59 S. Ct. 668, 83 L. Ed. 1014 (1939); *N.L.R.B. v. Cowell Portland C. Co.,* 108 F. (2d) 198 (C.A. 9, 1939).

Under the National Labor Relations Act before amended in 1947, the Board was both prosecutor and judge and this situation led to intense dissatisfaction with such an administrative system. Congress intended, with the amendments of 1947, to separate these functions by establishing the office of General Counsel and giving him final authority in regard to investigating charges, issuing and prosecuting complaints. If functions are to be separated, the Board must not tell the General Counsel which cases it desires to hear. Otherwise, the

General Counsel would have to govern his decisions in issuing complaints according to the mandate of the Board. It would mean that after the effort in presenting the case has been expanded, after all the evidence has been taken, after the transcript has been prepared and submitted to the Board, after the parties have journeyed to Washington to argue the case before the Board, then, after all of that, the parties are told by the Board that the complaint should not have been issued in the first place. Congress could not have intended to create such a frustrated authority in the General Counsel. An agency so established could lead to nothing but confusion and useless expenditure of Government and private funds.

II.

The Decision of the United States Court of Appeals Is in Conflict with the Principles Enunciated in the Decision of the Court of Appeals for the Third Circuit in Jacobsen v. N.L.R.B., 102 F. (2d) 96 (C. A. 3, 1941).

In the Jacobsen case, after involved and prolonged proceedings of unfair labor practice charges against an employer, the Board dismissed the complaint because it could not determine from the record if it had jurisdiction. The decision of the Board stated:

> " 'We are of the opinion that the facts set forth in the record are not sufficiently developed to afford a basis for determining whether or not the operations of the respondent affect commerce, within the

> meaning of the Act. Under such circumstances we ordinarily would dismiss the complaint without prejudice. However, in view of the long period of time which has elapsed since the filing of the charges and the nature of the proceedings heretofore had, the Board, acting within the discretion granted it by Section 10 of the Act, does not deem it advisable to reopen the record upon this point. We shall, therefore, dismiss the complaint in its entirety.' " (pp. 98-99).

Thereafter, the petitioner's petition to reopen before the Board was denied, and a petition to review was filed in the Court of Appeals seeking to reverse the order of the Board dismissing the complaint. The court remanded the matter to the Board clearly holding that since the jurisdiction of the Board was invoked, it must decide if it has jurisdiction and if it finds that it does have jurisdiction it must determine the unfair labor practice charges. It is apparent from the decision of the court that the Board's claim of discretion figured largely in the arguments before the court because the court stated:

> "We have dealt with the ramifications in this case in such detail because the questions presented are those both of jurisdiction and discretion." (p. 99)

In holding that the Board must determine its jurisdiction and thereafter determine the question of unfair labor practices, the court stated:

> "The Board is the judge of the facts and if its findings are supported by substantial evidence we must accept them. It has made no finding upon the fundamental issue of commerce affected. The Board took inconsistent positions. It stated that

the record did not afford a basis for determining whether the operations of Protective Motor Service Company affect commerce within the meaning of the act and then, in an exercise of discretion, refused to receive additional evidence upon this very pertinent issue. Aside from any question presented as to the right of the petitioners to adduce additional evidence, *the Board, having issued its complaint and proceeded to hearings, had the duty to decide in limine whether or not the operations of the Protective Motor Service Company affected commerce within the meaning of the act, and in our opinion it was error for the Board not to do this.*" (Emphasis added) (pp. 100-101)

. . . . .

"Accordingly a decree will be entered setting aside the order of the Board and remanding the cause with directions to reinstate the complaint, to allow the petitioners a reasonable opportunity to present the evidence referred to in their petitions, and to determine the issue of interstate commerce, *and if it be found that the operations of Protective Motor Service do affect commerce within the purview of the act, to determine whether or not that company has engaged in unfair labor practices and to issue an appropriate order in respect thereto.*" (Emphasis added) (p. 101)

It is true that the court in the Jacobsen case did not have the same question before it as is involved in this proceeding. It could not, of course, because at that time the General Counsel's office did not exist. However, the opinion, fairly construed, is a determination that when the jurisdiction of the Board is invoked the Board has the duty of first determining its jurisdiction in fact; secondly, if it has jurisdiction, to determine the unfair labor practice question; and thirdly, if it finds unfair

labor practices have been committed, issue an appropriate order with respect to them.

It is therefore submitted that this case is one calling for the exercise by this court of its discretionary power, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

WILBER HENDERSON,
Counsel for Petitioner.